

**JUN 18 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON**

**U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

JERRY FERNANDEZ,

Plaintiff-Appellant,

v.

JO ANNE B. BARNHART, Commissioner  
of Social Security,

Defendant-Appellee.

No. 02-35371

D.C. No. CV-01-05268-RJB

MEMORANDUM\*

Appeal from the United States District Court  
for the Western District of Washington  
Robert J. Bryan, District Judge, Presiding

Argued and Submitted June 4, 2003  
Seattle, Washington

Before: LAY,\*\* GOODWIN, and GOULD, Circuit Judges.

Jerry Fernandez appeals from an Order and Judgment of the United States  
District Court affirming the final decision of the Commissioner of Social Security

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

denying his claim for Social Security Disability Benefits. Fernandez applied for disability insurance benefits in December 1997, alleging disability since 1992 due to post traumatic stress disorder (PTSD), depression, and an anger problem. After denial of his application, Fernandez requested an administrative hearing.

Administrative Law Judge Charles S. Evans affirmed the decision that Fernandez was not disabled. The Appeals Council denied review and Fernandez sought judicial review in the United States District Court. The district court adopted the Report and Recommendation of Magistrate Judge John L. Weinberg and affirmed the Commissioner's decision on March 4, 2002. Fernandez timely appeals, claiming that the ALJ improperly discounted portions of the evidence.

We review a district court's order affirming denial of benefits *de novo* and may only disturb the Commissioner's decision if it was based on legal error or was not supported by substantial evidence on the record as a whole. See 42 U.S.C. § 405(g); see also Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). If the evidence can reasonably support either affirming or reversing the Commissioner, this court cannot substitute its judgment for that of the Commissioner. See Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999).

Fernandez first alleges that his mental health counselor, Patricia L. Chandler, M.A., should have been given treating physician status. As a therapist

without a doctorate, Ms. Chandler does not meet the regulations' requirements for an "acceptable medical source." See 20 C.F.R. § 404.1513 (2002). The regulation does allow, however, for the testimony of an "other source" as evidence of the severity of a claimant's impairment. See 20 C.F.R. § 404.1513(d) (2002). The regulations' listing of those qualified as an "other source" includes, inter alia, therapists, social welfare personnel, clergy, and family members. Under this circuit's precedent, an ALJ must either consider the testimony of such a lay witness or provide germane reasons for not crediting the testimony. See Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001) ("Lay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so.") (citation omitted); see also Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993). Ms. Chandler qualifies as an "other source" witness.

The ALJ's written decision does not expressly disregard or credit Ms. Chandler's opinion. The ALJ does note in his description of the evidence that Fernandez missed several of his appointments with Ms. Chandler, which made it difficult for her to evaluate his capacity for work. However, the ALJ never indicated that he used this as a reason for discounting her opinions. Even if the

ALJ had decided to discredit Ms. Chandler's evidence, he never expressed this in his opinion. Our case law requires more. See supra.

Ms. Chandler opined that Fernandez's maladies were enough to meet Social Security's Listing of Impairments. See 20 C.F.R. § 404.1525 (2002); 20 C.F.R. Ch. III, Pt. 404, Subpt. P, App. 1 (2002).<sup>1</sup> The ALJ found that Fernandez did not meet the Listings and was not disabled. If the ALJ had given credit to Ms. Chandler's opinions, this may have pushed the weight of the evidence on this question to favor disability. Likewise, if the ALJ had credited Ms. Chandler's testimony, it may have changed the result reached by the agency's Vocational Expert in evaluating whether Fernandez could successfully work in any job in the national economy. Accordingly, an ALJ must review this case again and either consider Ms. Chandler's testimony or give adequate reasons for discounting it.

When considering the record as a whole, it would seem the ALJ should have factored in Ms. Chandler's opinions. If credited, Ms. Chandler's testimony as to the Social Security Listings may have given Fernandez enough to meet his burden in establishing disability. If so, the burden would shift to the Commissioner to show there were jobs available in the national economy which Fernandez could

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<sup>1</sup>The Listing of Impairments catalogues those impairments of such severity that they presumptively preclude any gainful work activity.

perform. The Vocational Expert testified on cross examination that when Ms. Chandler's observations are added into the vocational hypothetical, a person like Fernandez would have great difficulty holding any employment. It is the job of the Commissioner to determine disability. There may very well be substantial evidence on the record as a whole to support the ALJ's findings even after crediting the opinions of Ms. Chandler. However, we leave this determination, along with the decision regarding Ms. Chandler's testimony, to the Commissioner.

REVERSED and REMANDED for further proceedings.